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United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS M. SHIELDS,
Plaintiff in Error,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant in Error.

No. 2585.

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, Judge.

Opening Brief of Plaintiff in Error

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STATEMENT OF THE CASE.

This action was commenced by the plaintiff in error as assignee of the claim of one Thomas Winsor against the defendant in error in the Superior Court of the State of Washington in and for the County of King, and was later transferred to the United States District Court, Western District of Washington, Northern Division, at Seattle, Washington.

The plaintiff in error by this suit sought to recover a judgment against the defendant in error, Columbia River Lumber Company, in the sum of

$10,000 and interest on account of conversion of certain stock.

Prior to the 23rd day of August, 1911, Thomas Winsor, who was the assignor of the claim sued upon, was employed by a selling committee of the defendant in error for the sale of their timber land situated in Chelan County, Washington, (See plaintiff in error's Exhibit No. 12, Record p. 63), and in the course of his efforts secured as a prospective purchaser one F. P. Kellogg.

On the 23rd day of August, 1911, an optional agreement was entered into between F. P. Kellogg and the defendant in error for the sale to Kellogg of the timber lands belonging to the defendant in error above referred to. This agreement is plaintiff in error's Exhibit No. 14, Tr. R. p. 67.

Recognizing the services of the plaintiff in error's assignor, Thomas Winsor, "in negotiating and effecting a sale of said property" an agreement was executed by the defendant in error and the said Thomas Winsor wherein the amount of said Thomas Winsor's compensation as broker was fixed at $10,000 (Plaintiff in error's Exhibit No. 13, Tr. R. p. 64), which compensation was taken in stock in a corporation to be organized by Kellogg.

Thereafter, on the 29th day of November, 1911, the said Kellogg fully exercising the option con-

tained in plaintiff in error's Exhibit No. 14, (Tr. R. p. 67), entered into a contract with the defendant in error, which contract and instrument is designated as plaintiff in error's Exhibit No. 20, as set forth in the record at page 122, whereby he became purchaser of the property of the defendant in error which conditions were thereafter fully carried out by Kellogg. Afterwards, the defendant in error desiring itself to become custodian of the stock, instead of leaving it in the hands of the Union Trust Company of Chicago, as was agreed in the agreement with plaintiff's assignor above referred to, requested Thomas Winsor to consent thereto, which change was consented to by Winsor, (Tr. R. pp. 140, 141, and 142). Thereafter defendant in error and Kellogg, without the knowledge, information or consent of Winsor, agreed to and did abandon all the terms and conditions of the sale of the property of the defendant in error whereby said Kellogg abandoned all right to redeem or purchase the whole or any portion of the stock of the Kellogg Lumber Company. The defendant in error thereafter denied the right of said Thomas Winsor to said stock, or any interest therein, and converted all of said stock to its own use. Thomas Winsor, after demanding the right to said stock, duly assigned his right and claim against the defendant in error to the plaintiff

in error, whereupon this action was brought to recover the sum of $10,000 with interest thereon.

At the close of plaintiff in error's testimony, upon motion of defendant in error, a non-suit was granted.

SPECIFICATIONS AND ASSIGNMENT OF ERRORS

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the motion of defendant for a non-suit and for the dismissal of the cause over the objection of the plaintiff and for entering judgment thereon.

II.

That the United States District Court for the Western District of Washington, Northern Division, erred in overruling plaintiff's motion for a new trial.

ARGUMENT.

The ruling made by the Honorable Trial Court sustaining the motion for non-suit, and the ruling made in denying the appellant's motion for a new trial, though separately assigned for error, will be here treated together, for if the action of the court

in sustaining the motion of the defendant in error for a non-suit was correct, then the action of the court in denying the motion for a new trial was also correct. Each ruling was based upon the construction given by the court to the terms and conditions contained in Exhibit No. 13 introduced in evidence by the plaintiff in error. If that construction is correct the judgment should be affirmed; if incorrect, the judgment should be reversed. This issue is narrow and if it be held by this court, in accordance with our contention, that the ruling of the District Court was erroneous, then, upon reversal, the order of this court should be that judgment be entered by the district court in favor of the plaintiff in error for the sum of $10,000 principal, together with lawful interest from the time of the conversion by the defendant in error of the stock held by the defendant in error for the benefit of the assignor of plaintiff in error.

II.

By reference to the opinion of the court, to be found in the transcript at pages 159 to 166 inclusive, it will be seen that the court finds that the plaintiff in error sustained the allegations of his complaint by the testimony, and was entitled to recover, *except for one reason*, and that was that the court held that the written instrument, (Plaintiff's Exhibit

No. 13), not only required that Thomas Winsor (the plaintiff's assignor) should have produced a purchaser ready and willing to buy the property of the defendant in error, and should cause such purchaser to enter into the form and character of contract provided by the defendant in error, but should thereafter *become a guarantor* for the faithful performance of all the terms and conditions of that contract upon the part of the plaintiff in error's assignor, and should not be entitled to receive his compensation as a broker for his services in procuring the purchaser until that purchaser had fully carried out the terms of the purchase through the five years during which the purchase money should be from time to time paid; and if the whole of such purchase money was not finally paid the broker should receive nothing. In other words, the contention of the defendant in error, which the court by the order of non-suit sustained, was and is that although the broker, Thomas Winsor, furnished the purchaser, brought the parties together, induced them to enter into the written instrument heretofore referred to, and although the defendant in error accepted the fruits of his labor and accepted his purchaser and sold to that purchaser the property in controversy for a sum and upon conditions satisfactory to such purchaser and said defendant in error, and that said purchaser took possession of the property, expended many

thousands of dollars in improvements thereon, built a mill-dam upon the Entiat River and a large mill thereat, and cut and rafted about seven million feet of timber to said mill, that still the broker Winsor (assignor of plaintiff in error) was not yet entitled to his commission, but that that commission must abide the final result of this sale, and to depend entirely upon whether the purchaser eventually complied with all the terms and conditions of said sale. This view of the instrument construed we feel to be unquestionably erroneous. Not only upon a mere reading of the instrument itself, but plainly in the light of all the testimony in the cause. Of course in the determination by the court as to the true meaning of the instrument in question, the situation of the parties, their relation to each other, the preceding steps taken by the parties, were proper for the consideration of the court in determining what the parties intended by the language used. Without discussion let us rapidly refer to the steps theretofore taken which brought about the execution of the instrument in question. On the 3rd day of July, 1911, the Columbia River Lumber Company, defendant in error, by written instrument (Plaintiff's Exhibit No. 12, Record p. 63) employed Thomas Winsor (plaintiff in error's assignor) to sell the timber land referred to in this controversy. Thomas Winsor made a thorough scale of

the timber involving a labor of more than sixty days, (Record p. 74 to p. 97 inclusive, and p. 156), and, as the court in its opinion concedes, performed his part of his contract, unless he was obligated to see that his principal throughout the five years within which the contract was to run should carry out all the terms and conditions thereof. The court in its opinion holds that the plaintiff's assignor, Thomas Winsor, brought the parties together, and they entered into a written contract between them for the sale of this land, and while they varied in the terms and conditions of that contract somewhat from those first agreed upon and adopted somewhat a new plan, yet said the court:

"I do not think that that would be material in this case, in view of the fact that the plaintiff in this case got the parties together, and, if the plan which was adopted was substantially the same as the original plans, the plaintiff in this case would be entitled to his compensation, if he was the agency which brought the parties together, and if the party carried out the agreement which was entered into as understood by the parties."

So that it will be seen that Thomas Winsor, the plaintiff in error's assignor, performed his whole duty as a broker in bringing the purchaser to the defendant in error and the purchaser and the de-

fendant in error made between them satisfactory terms and conditions of a purchase and sale of the property.

Again referring to plaintiff's Exhibit No. 13 (Record p. 64), it will be seen that it is therein specifically acknowledged, over the signature of the Columbia River Lumber Company, that the $10,000 for which Thomas M. Shields (plaintiff in error), as the assignee of Thomas Winsor, brings this suit, is a definite sum to be paid "as a commission" for perfecting said "*sale.*"

Originally, as appears by the testimony of Thomas Winsor, this $10,000 was to be paid in cash, but when the defendant in error and the purchaser closed their contract, such variations had been made between them as to some of the conditions; the purchaser desiring to have all the stock of the corporation placed in escrow to be taken up by such purchaser from time to time at par plus 6 per cent. annual interest, it was arranged that the said Thomas Winsor, instead of receiving cash, should have $10,000 of the stock of said company in lieu thereof, and by the terms of plaintiff's exhibit No. 13, that all the stock of the defendant corporation should be placed in the hands of the Union Trust Company of Chicago, Illinois, to be held in escrow so that the purchaser might at all

times have the opportunity to take up said stock at par plus 6 per cent. annual interest, and that said Union Trust Company

> "are hereby requested and directed that when the certificates of stock mentioned in said agreement are delivered to you by F. P. Kellogg, or his assigns, for the benefit of the Columbia River Lumber Company, *to set over and hold for the benefit of Thomas Winsor $10,000 worth of said certificates.*"

Here was a setting apart and devotion of $10,000 worth of this stock for the benefit of Thomas Winsor, for what? The instrument answers that question:

> "To cover all the claim or claims of the said Thomas Winsor * * * against any of the parties to said transaction on account of commissions for the negotiating and completing the *sale of said property.*"

Our contention is that this stock then and there became the property of Thomas Winsor, and the court in construing the contract plainly would have upheld our view to that effect except for the opinion that certain words in that instrument indicate that this stock was dependent upon the purchaser's *eventually making good all the terms of his contract.* These words upon which the court lays stress are as follows:

> "Now, therefore, in consideration of the services rendered by Thomas Winsor * * * * *in negotiating and effecting a sale of said property*, the Columbia River Lumber Co. have agreed in event of said Kellogg's carrying out completely *the said proposed sale*, to pay as a commission for *perfecting said sale* the said sum," etc.

It will be noted that the *sale* had not yet been made; the conditions had been proposed and a tentative agreement had been made by another instrument referred to in this exhibit. That reference is as follows (Record p. 64):

> "Reference is hereby made to an agreement dated August 23rd, 1911, between the Columbia River Lumber Company and F. P. Kellogg wherein the Columbia River Lumber Company have upon the terms in said agreement mentioned, agreed to sell to F. P. Kellogg certain property located in Chelan County, Washington, for the agreed price of $225,000; also a certain escrow agreement dated August 23, 1911; directed to you as escrow agent providing for a payment by Kellogg, or his assigns, a corporation to be organized, as is provided in the agreement above mentioned, to you as escrow agent for the benefit of the Columbia River Lumber Co., $225,000, the purchase price of said property. Reference is made to the above two agreements the same as if the terms of said agreement were here set out in full."

Referring now to the agreement for the sale of the property mentioned as of date August 23, 1911, which appears in the record at page 67, it will be found that such instrument is but an *option to purchase*, and is in the form of a letter addressed to the purchaser and begins:

"F. P. Kellogg, Esq., Seattle, Washington:

"Dear Sir: For One Dollar and other valuable consideration, the receipt whereof is hereby acknowledged, we hereby *grant to you the option to* purchase from us at any time during a period of four months from the date hereof our entire property located in Chelan County, Washington, the particular description of which is attached hereto and made a part hereof, upon terms and conditions as follows, to-wit:"

Then follows a complete recital of the terms and conditions upon which the purchaser might buy. Among the conditions being that the purchaser should organize a corporation with the proposed name left in blank, providing for the issuance for that corporation of bonds not to exceed $225,000; that the money from the sale of the bonds should be expended by the payment of $80,000 to the defendant in error, and the balance used in the building of a new mill and the conduct of the business. That $2.00 per thousand of every thousand feet of timber manufactured should be applied to the re-

tiring of these bonds, and that all profit derived from the business, including the sale of logged off land, untimbered land, and timber land exclusive of timber, should be applied solely to the payment of the unpaid purchase price. A number of other conditions being also included. Thus it will be seen that this was but *a four months' option* to the purchaser *for the purchasing* of said property, and is referred to and expressly made a part of the instrument heretofore called to the attention of the court. (Plaintiff's Exhibit 13, Record p. 64.)

Is it not therefore perfectly plain that when this stock was agreed to be set apart "for the benefit of Thomas Winsor for negotiating and effecting a sale of the property" and the language was used "In event of said Kellogg carrying out completely the said *proposed sale*" that it was meant that the option should be exercised, the *sale made* upon the terms and conditions proposed, and that *when the sale was so made* the stock should *become the stock of Thomas Winsor?* Is there any reason for supposing that the parties meant that not only should the option be exercised, and *the "proposed" sale* become an actual completed sale, but all the payments and conditions to be made and carried out *after the sale was completed*, should be guaranteed by the broker? A broker's duties are so well known, and are so limited, that it can hardly be conceived that either of

spectfully urge that the court's construction of the instrument is incorrect. The language used is not that Kellogg will first carry out completely the "proposed sale" *and will also*, after such sale, carry out all the varied terms of the contract of sale, but *only* that he will carry out completely "*the said proposed sale.*"

Among other conditions in the proposed sale or option agreement, (Plaintiff's Exhibit 14), are arrangements for a sliding scale salary for Kellogg, as President of the Lumber Company, increasing from $3000 to $5000 per annum. After three or four years' service at such increasing salary, after the building of the mill and the operation thereof, for that length of time, and after due performance in other respects of the terms of the contract, should Kellogg and the defendant in error have become antagonistic and Kellogg has resigned his position, leaving the improved and valuable property in the hands of the defendant in error, would Winsor have forfeited his stock? It may be said that thsee queries are not important now since those things did not in fact occur; but they *are* important in determining whether it is contemplated by the contract that the broker Thomas Winsor was guaranteeing his purchaser to fulfill in future the conditions of his purchase. Apart from all these reasonings and devoting ourselves solely to the narrow

language that moved the court to sustain the motion for a non-suit, is it possible to sustain the ruling?

The two instruments (Plaintiff's Exhibits 13 and 14) are to be construed together as one instrument, according to the terms of Plaintiff's Exhibit 13, "the same as if the terms of said agreement were here set out in full." In other words, Exhibit No. 13, which provides for setting apart $10,000 of the stock to Thomas Winsor, refers to the "proposed sale" instrument, and provides that his purchaser should carry out the *proposed sale* and no more. Two instruments were being drawn at the same time and of the same date. One of them, Exhibit No. 13, was to be transmitted to a trust company which was to hold these bonds and therein the trust company was being advised of its power of control over the bonds. The other instrument, Exhibit 14, was the *option* to purchase the property. The first was proceeding upon the theory that Kellogg might, or might not, elect to purchase the property and therefore Winsor might, or might not, become entitled to his commission. What more natural than that the provision should be inserted that this commission, this $10,000 worth of stock, should be declared to be due Thomas Winsor for his commission "in the event of Kellogg's carrying out completely the said *proposed sale*"? The word "sale" has a definite and well understood meaning; it is the com-

pleted agreement between the parties; it may be for cash; it may be upon long credit; it may be upon simple or upon very complicated terms, but the one is as much a *sale* as the other. It would be folly to claim that a proposed sale upon complex conditions or long time is any less a sale than one for cash and no conditions. And when one contracts to do something when a "proposed sale" is carried out, he means when the proposed sale becomes an *actual sale*, and not when the purchaser pays the last farthing upon long time notes or actually carries out any of his obligations under the sale itself.

If our contention thus far be conceded by this Court, does it not follow that upon reversal of the judgment this Court should enter an order to the effect that the court below should enter a judgment in favor of the plaintiff in error for the sum of $10,000 together with interest thereon from the date of the conversion by the defendant in error of the $10,000 worth of stock set apart to Thomas Winsor by the agreement of the parties? When this stock, by the agreement (Plaintiff's Exhibits 13 and 14), was set apart for the "benefit of said Thomas Winsor" it was to be his whenever his purchaser, Kellogg, should enter into the proposed agreement for the sale of the property and become the purchaser thereof. And pursuant to the agreement of all the parties this stock was to be placed

in the hands of the Union Trust Company as trustee for all the parties, with the other stock, so that Kellogg might become the purchaser of all the stock, including Winsor's $10,000 worth, at par, plus 6 per cent. annual interest thereon. Whenever Kellogg should pay into the hands of the trustee the amount equaling the value of Winsor's stock, the money should become the property of Winsor in lieu of the stock. This arrangement was in no wise an assertion to the effect that Winsor was not the owner of such stock any more than that it was an assertion *that the defendant in error did not own the balance of the stock. All* the shares so deposited were subject to the same condition. Kellogg must pay for the stock belonging to the defendant in error before he could become the owner thereof; similarly he must pay for the stock of Thomas Winsor in order to become the owner thereof. He did not, in fact, pay for either, and therefore, both the defendant in error and Thomas Winsor remained the owner of the amount of stock which each deposited. Would the defendant in error now concede that the stock deposited for the benefit of said de-defendant in error did not remain *its* property? Most certainly not. Actions speak louder than words. The defendant in error got *its* stock back, has ever since owned and held it, and controls the lumber company, the mill and its output, by virtue of its ownership of that very stock.

While the defendant in error by its answer denies that it ever converted *any stock of Thomas Winsor*, its answer is but a negative pregnant, and by the testimony it was clearly shown that if this *was* Thomas Winsor's stock, then the defendant in error *had* converted it, because after Kellogg had carried out the "proposed sale" and he and the defendant in error had executed a written agreement in accordance with the terms of the proposed option, and the purchaser Kellogg had taken possession of the property, exercised dominion over it as owner; had complied with all the terms of the sale, had organized the corporation (The Kellogg Lumber Company), as agreed upon, had bonded the property as agreed upon, had paid over from the proceeds of such bonds the sum of $80,000 to the defendant in error, and had issued the stock provided for and was ready to deposit the same with the Union Trust Company as trustee for all the parties, including the $10,000 worth of Thomas Winsor, *the defendant in error asked to have itself accepted as trustee* instead of the Union Trust Company, and requested Thomas Winsor to consent that the defendant in error should itself become the custodian, as trustee, of his particular $10,000 worth of stock, and he (Thomas Winsor), in writing, consented, expressly, however, refusing to have any other condition changed. In accordance with such agreement

all the stock including that of Winsor passed into the hands of the defendant in error as trustee for all the parties. Afterward the defendant in error, without the knowledge or consent of Thomas Winsor, in his absence, and I think we may fairly say, with intent to deprive said Winsor of his earned commission which had become merged in this $10,000 worth of stock, made a *new arrangement* with the purchaser Kellogg by the terms of which Kellogg and the defendant in error "rued their contract," and the ownership of the property was placed in the defendant in error upon certain considerations, among others, being that Kellogg should operate the property as the agent and employee of the defendant in error at a handsome salary. After this action Winsor addressed the defendant in error with reference to the condition of his $10,000 worth of stock and was informed by the defendant in error that he, Winsor, had no stock; that the defendant in error owned the stock and was not responsible to Winsor therefor, and would not deliver any such stock to him. Under all authority this was a conversion of the stock. The only question remaining is: What was the value of this stock? It will be observed by the Court, by reference to Plaintiff's Exhibit No. 13, that there are no *number of shares* of stock agreed upon to be set over to Thomas Winsor, but that there should be set over and held "for the

benefit of Thomas Winsor *$10,000 worth* of said certificates". This was a determining of the value of property to be given to Thomas Winsor in lieu of the $10,000 he had earned as his commission for the sale of this property. It was further provided that when Kellogg took up these securities he should pay to Thomas Winsor, or to the defendant in error for the benefit of Winsor, $10,000 in cash plus 6 per cent. interest thereon, which seems to be an actual *fixing by the parties* of the value of said stock. At least it was a determination of the amount to which Winsor was entitled, and had *Kellogg* converted such stock no one would question that having agreed as he did to *buy this stock*, so placed in escrow, *at* $10,000 plus 6 per cent., he could not after conversion have denied its equivalent value; nor can the defendant in error after having procured the possession of this stock and having converted it to its own use, and denied and yet denying the ownership of Winsor, or of the plaintiff in error, his assignor, be heard to say that the value thereof was at the time of the conversion less than the agreed value.

Should the Court, however, disagree with our contention in this respect, yet upon referring to the testimony of Thomas Winsor at Tr. Record p. 105 will find that that testimony, which is entirely unchallenged, and its truth conceded by the motion

for non-suit, shows the value of the property and its encumbrance, and clearly establishes that the property was not only solvent but worth about $600,000.00 over and above all the encumbrances; was a going concern, and the stock perforce must have been worth its face value.

This testimony of Thomas Winsor together with the provisions of Plaintiff's Exhibits 13 and 14 was proof sufficient to justify the jury in finding a verdict in favor of the plaintiff in error for $10,000 and the accumulated interest. And *the jury should have been permitted to pass upon its sufficiency.* It was a question of fact fairly within the cognizance of the jury, and the court in its opinion acknowledges the justice of this contention, except only that the court was persuaded that the instrument (Plaintiff's Exhibit 13) by its terms compelled the plaintiff in error to depend entirely upon reaping the reward of his services by waiting until Kellogg, the purchaser, paid the last farthing of his indebtedness to the vendor. The fact that the vendor and vendee, in the absence of the owner of the $10,000 worth of stock, for considerations sufficient between themselves, secretly changed their agreement of sale and purchase, and the vendor received the property back from the vendee, and the vendee Kellogg gave up his right to purchase the stock, and the trustee holding the stock, being the defendant in error, pro-

ceeded to appropriate the same and to deny the title of Thomas Winsor in the same, was a wrong to the broker, and by such indirection he could be deprived of all interest in the stock or be bereft of his hard-earned commission. It is true that the Honorable Judge of the District Court in his opinion (Tr. Record p. 164) comforts the losing broker and his assignor, the plaintiff in error, in this language:

> "I appreciate the plaintiff has done much service, but the court cannot make contracts."

And again, in its opinion, the Honorable Judge of the District Court, in commenting upon the contention of the defendant in error, that Winsor was not entitled to his commission because the contract for the proposed sale was afterward varied by the vendor and purchaser so as to make a somewhat different plan of control of, and manner of payment for the property, says (Record p. 161):

> "It shows further, and it is conceded that the terms and conditions of that agreement were not carried out. They were abandoned and a new plan was adopted by the parties afterwards. I do not think that that would be material in this case, in view of the fact that the plaintiff in this case got the parties together, and, if the plan which was adopted was substantially the same as the original plans, the plaintiff in this case would be entitled to his compensation if he was the

agency which brought the parties together, and if the parties carried out the agreement which was entered into as understood by the parties."

It had been defendant in error's contention that the new agreement by the parties, here referred to by the Court, had freed them from liability to Winsor. (Tr. R. p. 100, Letter of Mr. Selover to Mr. Winsor.) (Plaintiff in Error's Exhibit 16.)

It is respectfully submitted that the judgment of the court below upon principle and upon authority must be overthrown. See the following:

Bishop vs. Averill, 17 Wash. 209.

Duncan vs. Parker, 81 Wash. 340.

Carsten vs. McReavey, 1 Wash. 359.

It seems to us that the defendant in error having by his motion for non-suit waived the right to introduce any evidence in its behalf, and having by its action submitted the matter in controversy to the court over our objection, that the plaintiff in error was entitled:

1st. To a judgment upon the merits and that that judgment should have been in behalf of the plaintiff in error for the sum of $10,000 and interest.

2nd. That if the plaintiff in error was not entitled to such summary judgment by the *court*, that he was at least entitled to have the cause submitted to the jury upon the evidence thus challenged.

3rd. That in any event he is entitled to have the cause reversed with orders to the District Court to submit to a new jury the evidence taken in the former trial, and to have a verdict upon said testimony.

We, therefore, respectfully submit to the Court our contention as above, and pray for the most favorable relief to which the record entitles the plaintiff in error.

Respectfully submitted,

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